United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1079

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAMON RIVERA,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Ramon Rivera appeals from a judgment of conviction entered on January 4, 1974, in the United States District Court for the Southern District of New York following a five day trial before the Honorable Marvin E. Frankel, United States District Judge.

Indictment 73 Cr. 941, filed October 4, 1973, charged Ramon Rivera, Alfredo Agrello and Gregorio Castillo in Count Two with distributing and possessing with intent to distribute one-eighth kilogram of cocaine and in Count One with conspiring to do so. Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and 846, and Title 18, United States Code, Section 2.

Trial of all three defendants commenced on November 27, 1973. On November 29, 1973, out of the presence of the jury, Agrello and Castillo withdrew their pleas of not

guilty and pleaded guilty to both counts of the indictment.* On December 3, 1973, the jury found Rivera guilty on both counts. On January 4, 1974 Judge Frankel sentenced Rivera to concurrent terms of two years imprisonment, to be followed by three years special parole.

Rivera, Castillo and Agrello are presently incarcerated pursuant to their respective judgments of conviction.

Statement of Facts

The Government's Case

On September 25, 1973, Anibal Romeo, a Government informant, met Rivera near 72nd Street and Columbus Avenue, New York City and discussed the purchase of one-quarter kilogram of cocaine by Romeo (Tr. 26-28).

The following day, September 26, 1973, Romeo and Rivera twice discussed the details of the cocaine purchase on the telephone and Rivera told Romeo to pick him up later that afternoon, when they would drive to 140th Street and Broadway in Manhattan to complete the purchase.**

As instructed, Romeo met Rivera at the Park Plaza Hotel, on 77th Street and Columbus Avenue. From there they proceeded to 140th Street and Broadway, where they met Bob Nievas, a Special Agent of the Drug Enforcement Administration acting in an undercover capacity as the ultimate buyer of the cocaine (Tr. 235). Throughout the negotiations to purchase the cocaine, Rivera acted as the intermediary between the Government purchasers and the suppliers (e.g. Tr. 44).

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* On January 2, 1974 Agrello and Castillo were sentenced to concurrent terms of five years imprisonment, to be followed by three years special parole.

** Both telephone conversations of September 26, 1973 between Rivera and Romeo were tape recorded with Romeo's consent. The tapes of the conversations, mostly in Spanish, were admitted into evidence, and the jury was provided with a transcript in English to aid them as they listened to the tapes (Tr. 80-86, 234-35, 406-07).

After waiting for approximately one-and-one-half hours, Rivera introduced Romeo to the two co-defendants, Agrello and Castillo at 137th Street and Broadway, while Nievas remained near 140th Street and Broadway (Tr. 44, 143-44). The four men discussed additional details of the purchase of the one-quarter kilogram of cocaine. At approximately 7:00 p.m., while Castillo remained behind, Romeo, Rivera and Agrello joined Nievas and agreed that the cocaine would be delivered at 9:00 p.m. that evening. Romeo and Nievas then drove away (Tr. 46-47, 49, 144).

As planned, at approximately 9:00 p.m. that evening Romeo and Nievas returned to 140th Street and Broadway and met Rivera. Ten minutes later, Romeo went into Jack's bar on the corner of 140th Street and Broadway, where he met Castillo and Agrello in the men's room and was handed one-eighth kilogram of cocaine (Tr. 54-55).* The quality of the cocaine was discussed, the drug returned to Castillo, and Romeo left the bar and rejoined Nievas and Rivera outside. Romeo told Nievas that the cocaine was in the bar and Nievas walked toward Jack's bar, meeting Agrello, who had followed Romeo out of the bar, in the street. Castillo had remained in the bar (Tr. 60, 250).

When Nievas reached the bar, he gave a signal for the arrest. Surveillance agents arrested Romeo, Nievas and each of the defendants (Tr. 149, 251).

No cocaine was seized from any defendant, but one-eighth kilogram of cocaine was found in a waste basket in the ladies' room of the bar wrapped the same way as the cocaine shown to Romeo minutes earlier.

The Defendant's Case

Rivera presented no evidence (Tr. 433).

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* Although the planned sale was of one-quarter kilogram of cocaine, at the 9:00 p.m. meeting, the price of the cocaine was raised from $2,700 to $4,000 for one-eighth kilogram (Tr. 50-51). Nievas had only $6,000 with him (Tr. 49).

ARGUMENT

POINT I

The Court properly instructed the jury that they could not draw any inference of Rivera's guilt from the guilty pleas of the two co-defendants.

On the third day of trial, Castillo and Agrello, out of the presence of the jury, withdrew their not guilty pleas and pleaded guilty to the indictment. Following a discussion between Judge Frankel, the prosecutor and Rivera's counsel about what should be told the jury about the departure of Agrello and Castillo from the trial (Tr. 203-205), Judge Frankel brought in the jury and explained that Agrello and Castillo had entered guilty pleas but that those guilty pleas did not constitute any evidence against Rivera (Tr. 232-33). No objection or request for additional instructions was made by defense counsel.

Nonetheless, on appeal Rivera contends that he was deprived of a fair trial, of his right to confrontation and cross-examination, and of his right to be convicted only upon properly admitted evidence because Judge Frankel informed the jury that Rivera's two co-defendants had withdrawn their not guilty pleas and entered pleas of guilty to the charges against them. The well established precedent in this Circuit is, however, that it was not error to advise the jury of a co-defendant's guilty plea if such advice is coupled with the proper instructions. *United States* v. *Mingoia*, 424 F.2d 710, 714 (2d Cir. 1970); *United States* v. *Light*, 394 F.2d 908 (2d Cir. 1968); *United States* v. *Dardi*, 330 F.2d 316, 332-333 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964); *United States* v. *Crosby*, 294 F.2d 928, 948-50 (2d Cir. 1961), *cert. denied sub nom.*, *Mittleman* v. *United States*, 368 U.S. 984 (1962).*

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* *United States* v. *Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966), cited by Rivera does not address itself to the issue raised here and only discusses the inapposite proposition that a guilty plea during the course of a trial should not be entered with the jury present.

On three occasions, Judge Frankel carefully instructed the jury to draw no inference of guilt against Rivera by reason of the guilty pleas of the co-defendants.

Immediately upon advising the jury of the guilty pleas of Rivera's co-defendants, Judge Frankel said:

> ". . . in our system of justice guilt or innocence is a strictly personal and individual matter.
>
> That means specifically in the context of this case that the entry of a plea of guilty by any person as respects himself is no evidence whatever as to the guilt or innocence of any other individual, and that is important.
>
> More specifically, the fact that Messrs. Castillo and Agrello, for their own interests as they understood them, and on the facts relating to them as they understood them pleaded guilty, has no bearing whatsoever on the defendant Mr. Rivera. It is no evidence whatever that either of them was in a conspiracy with him or he was in any conspiracy whatever. His plea of not guilty stands, the presumption of innocence remains in his favor, and the questions that will confront [the jury] are the separate and individual questions as to him after the record of evidence in this case has been completed.
>
> We all count on you to pay strict and faithful attention to those principles" (Tr. 232-233).

In addition, twice during the charge to the jury, Judge Frankel reminded the jury that their determination of Rivera's innocence or guilt was not to be affected by the guilty pleas of Rivera's co-defendants.

> "I remind you . . . of the important principle that in our system guilt or innocence is strictly an individual matter. Whatever may have transpired in this case with respect to the defendants Agrello and

Castillo, you have now before you the exclusive, the separate and the individual question of the guilt or innocence of the one defendant with whom you are concerned, Ramon Rivera" (Tr. 500).

* * * * *

"On the other hand, if you do find there was such a conspiracy, you reach what I listed for you as the second essential element, you reach the question whether the defendant here on trial has been proved to be a member, a participant, in a conspiracy. On that, remember that you are considering a question as to him as an individual. The separate question is guilt or innocence or his membership or non-membership in this conspiracy.

The participation or membership of someone in a conspiracy must be established by evidence as to his own words, his own actions, and his own conduct, taken together with the actions and conduct of other people with whom he is found by you to have had relationships or connections that are meaningful to you on this subject.

But remember that the one defendant in this case has pleaded not guilty. He denies, to focus on the subject now at hand, membership in the alleged conspiracy. Whether or not his membership has been proved beyond a reasonable doubt, I repeat to you for the last time, but I repeat it because of its importance, is not affected by the status of anybody else, specifically, the question whether anybody else pleaded not guilty (sic) to this accusation" (Tr. 511-512).

Indeed, the defendant himself stated in summation to the jury:

"... Rivera is charged individually, and you must decide and rule on him as an individual ..." (Tr. 460).

Moreover, Rivera can hardly complain since he suggested no alternative when Judge Frankel sought his opinion on the procedure to be followed to explain the sudden absence of the co-defendants and made no objection either when the procedure was proposed or at any time thereafter (Tr. 203-05, 233). See *United States* v. *Price*, 447 F.2d 23, 30 (2d Cir.), *cert. denied*, 404 U.S. 912 (1971).

Finally, Rivera admits that ". . . a guilty plea, standing alone, inculpates only the one who has pled guilty" (App. Br. 9), and his reliance upon the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968) is misplaced. Here all of the witnesses who inculpated Rivera were subject to cross-examination. See *United States* v. *Tropiano*, 418 F.2d 1069, 1080-1081 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970); *United States* v. *Mulligan*, 488 F.2d 732, 737 (9th Cir. 1973).

POINT II

Judge Frankel's limitations on Rivera's cross-examination of Romeo were entirely proper.

Rivera contends that Judge Frankel unduly limited his cross-examination of Romeo in ruling that Romeo could not be asked whether he had committed the crimes charged in an indictment returned against him (Tr. 103) and in sustaining the Government's objection to the admission of that indictment in evidence (Tr. 124). These contentions are without merit.

The first claim is sufficiently disposed of by the fact that Rivera's counsel took no exception to Judge Frankel's ruling (Tr. 103). But beyond that, it is clear that Judge Frankel was well within his discretion in refusing to permit Romeo to be asked whether he was guilty of the charges in the indictment. Prior acts of misconduct by a witness not the subject of conviction are almost never a proper area of

inquiry on cross-examination. *E.g., United States* v. *Kahan,* 479 F.2d 290, 294-295 (2d Cir. 1973), *rev'd in part on other grounds,* 42 U.S.L.W. 3482 (U.S., February 25, 1974); *United States* v. *Sposato,* 446 F.2d 779, 780-781 (2d Cir. 1971). An exception to this general rule permits showing the existence of pending charges against a Government witness to establish bias or interest. *United States* v. *Miles,* 480 F.2d 1215, 1217 (2d Cir. 1973). Judge Frankel permitted Rivera's counsel to elicit testimony about the existence of the four count indictment against Romeo (Tr. 113) and the fact that, if convicted, Romeo faced a very substantial jail term and deportation (Tr. 97, 113). Precluding inquiry into Romeo's guilt of the charges was well within Judge Frankel's discretion, *United States* v. *Miles, supra,* as was his refusal to admit the indictment into evidence. *United States* v. *Zane,* Dkt. No. 73-2401 (2d Cir., April 1, 1974), slip op. at 2512. Moreover, here the trial judge's restriction on questions about Romeo's guilt was hardly of significance, since counsel for Castillo, then still in the case, had, in the absence of an objection by the Government, elicited from Romeo on cross-examination that he had admitted the four illegal cocaine sales charged in the indictment pending against him (Tr. 78-79).

In any event, the jury had more than enough before it to form an adequate appraisal of Romeo's credibility. *United States* v. *Blackwood,* 456 F.2d 526 (2d Cir.), *cert. denied,* 409 U.S. 863 (1972). In addition to the questioning Judge Frankel did permit about the charges pending against Romeo and the consequences to be suffered on conviction, the jury heard about Romeo's arrest, his friendship with federal narcotics agents, the fact of his illegal presence in the United States, his receipt of seven hundred dollars in payment for his services in this case, the promises made to him by the agents that his activities as an informant would be brought to the United States Attorney's attention in connection with Romeo's case, the pressure placed on him by the agents to make cases, his suffering from epilepsy and

his three previous brain operations (Tr. 63-64, 70-74, 92-94, 112, 115). This was more than sufficient to permit Rivera's counsel to argue in summation, as he did, that Romeo's testimony should be rejected because he had been arrested for four sales of cocaine, was facing imprisonment up to 60 years, was illegally residing in the United States, was released from imprisonment on low bail one day following his arrest and was pressured to make cases or be deported or jailed (Tr. 456, 466).

POINT III

Rivera was not deprived of a fair trial by reason of an unanswered question which the jury was told to disregard.

Rivera contends that the following questions asked by the Government of an Assistant United States Attorney based on a post-arrest interview conveyed to the jury the impression that Rivera previously had been convicted of a crime, thus depriving him of a fair trial:

> "Q. Did you make any inquiries about his possible previous criminal record? A. I did.
>
> Q. Did you ask him whether or not he had any convictions?
>
> Mr. Aidala: Objection, your Honor.
>
> The Court: Sustained.
>
> Mr. Aidala: I move for a mistrial at this time.
>
> The Court: That is denied. We are not interested in that subject at all. There is no information before the jury about that" (Tr. 299-300).

While concededly the question should not have been asked, reversal is required only if, in the context of the whole case, the effect was so prejudicial that it could not be cured by the trial judge's sustaining the objection and giving a curative instruction. *United States* v. *Pfingst,* 477 F.2d 177, 188 (2d Cir.), *cert. denied,* 412 U.S. 941 (1973); *United States* v. *Semensohn,* 421 F.2d 1206, 1209 (2d Cir. 1970). While reversal may be warranted if such a question about a defendant's prior record (other than to impeach him as a witness with a felony conviction) is answered affirmatively, *United States* v. *Rinaldi,* 301 F.2d 576, 578 (2d Cir. 1962), or if the question, though never answered, clearly insinuates the affirmative response, *United States* v. *Semensohn, supra,* 421 F.2d at 1207 ("Now, you were convicted of grand larceny, weren't you?"), here no ". . . improper information reach[ed] the ears of the jury." *Id.* at 1208. As a result, Judge Frankel was clearly correct in concluding that sustaining the defense objection and giving a curative instruction was sufficient. *United States* v. *Cohen,* 489 F.2d 945, 950-951 (2d Cir. 1973); *United States* v. *Rifkin,* 451 F.2d 1149, 1154 (2d Cir. 1971). See also *United States* v. *Haskell,* 327 F.2d 281, 284 (2d Cir.), *cert. denied,* 377 U.S. 945 (1964); *Johnson* v. *United States,* 424 F.2d 537 (9th Cir. 1970). In view of the strong case against Rivera it may fairly be said that the asking of this question was a trial error with ". . . only a marginal prejudicial impact when viewed against the background of the case as a whole. . . .", *United States* v. *Semensohn, supra,* 421 F.2d at 1208.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MICHAEL Q. CAREY,
JOHN D. GORDAN III,
Assistant United States Attorneys, Of Counsel.

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Form 280 A - Affidavit of Service by Mail

MCQ:ml

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MICHAEL Q. CAREY, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 19th day of April, 1974 he served a copy of the within brife for the U.S.A. by placing the same in a properly postpaid franked envelope addressed:

Louis R. Aidala, Esq.
1250 Broadway
New York, New York 10001

And deponent further says that he sealed the said envelope and placed the same in the mail box drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Michael Q. Carey
MICHAEL Q. CAREY

Sworn to before me this

19th day of April, 1974

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1975